STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2014
v	No. 314636 St. Clair Circuit Court
PRINCETON MARTEZ HINKINS, Defendant-Appellant.	LC No. 12-001456-FH

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to rob while unarmed, MCL 750.88. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 4 to 22½ years for his assault with intent to rob while unarmed conviction. We affirm.

Defendant argues that his trial counsel was ineffective for failing to object to the trial court's restitution award and imposition of attorney fees. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are review for clear error, and the constitutional question is reviewed de novo. *Id*. Because defendant did not preserve this issue for appeal, our review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Both the United States Constitution and the Michigan Constitution provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To prove a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness, and (2) that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Because the defendant bears the burden of demonstrating both deficient performance and prejudice, he "necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).

The trial court properly awarded restitution; consequently, any objection by defense counsel to the amount awarded would have been futile. The trial court awarded restitution based upon MCL 780.766(3) and (4), which provides, in relevant part:

> (3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:
>
> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> (*i*) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (*ii*) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (c) Pay the costs of the seizure or impoundment, or both.
>
> (4) If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:
>
> (a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

The trial court is permitted to award restitution based on losses that are "easily ascertainable and are a direct result of a defendant's criminal conduct." *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). The trial court is not required to make a separate factual finding on the record regarding restitution when there is no dispute. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997). Because defendant did not dispute the amount of restitution, the trial court properly relied on the statements and recommendations made in the Presentence Investigation Report, which recommended $2,469.69 in restitution, for repairs to the victim's vehicle, for items stolen from the vehicle, and the victim's medical expenses. The trial court was permitted to consider these factors in awarding restitution, pursuant to MCL 780.766(3)(b)(*i*) and (4)(a). A trial court can properly consider the cost of repairs instead of the fair market value in determining restitution when the record supports that determination. The

testimony at trial indicated that Davenport received medical attention for his injuries, and the repairs for his vehicle were valued at $2,250.16. The evidence supported the trial court's determination of restitution. So the restitution award was proper, and defendant's trial counsel was not ineffective for failing to object.

Next, defendant argues that his trial counsel was ineffective for failing to object to the attorney fees the trial court imposed. The trial court ordered defendant to pay $3,172.16 in attorney fees pursuant to MCL 769.1k(1)(b)(*iii*), which permits a trial court to impose fees for "[t]he expenses of providing legal assistance to the defendant." Our Supreme Court has held that a trial court is not required to evaluate whether a defendant has the ability to pay before assessing attorney fees. *People v Jackson*, 483 Mich 271, 289-290; 769 NW2d 630 (2009). Further, the Court held that a defendant's ability to pay does not need to be considered until a trial court enforces the order of attorney fees. *Id*. at 292. Only then must the defendant "be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency." *Id*.

Based on the foregoing, defendant's trial counsel was not ineffective for failing to object to the amount of restitution or for the imposition of attorney fees, and for failing to raise the issue of defendant's ability to pay either amount. Both the restitution award and attorney fees were proper. Defense counsel is not ineffective for failing to make a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Last, defendant argues that the trial court erred because it failed to enter a separate order regarding attorney fees. We disagree. Defendant's argument lacks both factual and legal support. First, the judgment of sentence entered on December 10, 2012, does not include an order that defendant reimburse the county for the expense of his attorney. Second, the trial court's order for attorney fees appears as an entry in the circuit court's register of actions on December 17, 2012, and is part of a separate order entered on April 9, 2013, that defendant owed a balance of $3,370.16, "not including restitution." This amount is consistent with the register of actions entry providing that defendant pay attorney fees of $3,172.16.[1]

Defendant's legal argument is based on a summary disposition order in *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007), which stated that "[i]f the court decides to order the defendant to pay attorney fees, it shall do so in a separate order, and not the judgment of sentence." See also *People v Rounsoville*, 481 Mich 932; 751 NW2d 25 (2008) and *People v Ransom*, 481 Mich 926; 751 NW2d 35 (2008). But in *Arnone*, *Rounsoville*, and *Ransom* the defendants committed their offenses before MCL 769.1k(1)(b)(*iii*) took effect on January 1, 2006, which provides the statutory basis for a court to order attorney fees as part of a sentence. Our Supreme Court in *Arnone*, *Rounsoville*, and *Ransom* also relied on *People v Dunbar*, 264 Mich App 240, 255-256; 690 NW2d 476 (2004), which the Court subsequently overruled in *Jackson*, 483 Mich 271 (2009). Furthermore, none of the cited orders provides a reasoned basis for ignoring the plain language of MCL 769.1k(1)(b)(*iii*), which permits a trial court to impose as part of a sentence "[t]he expenses of providing legal assistance to the defendant." As such,

[1] In addition to restitution, the judgment of sentence included other cost and fees of $198.

the orders lack binding precedential value because the only cited reason for the decision, *Dunbar*, was subsequently overruled. See *DeFrain v State Farm Mut Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012) ("An order of this Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision.").

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder